Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AMERITECH CORPORATION, Transferor to SBC COMMUNICATIONS INC., Transferee	CC Docket No. 98-141

Reply Comments of the United States Telecom Association Regarding SBC Communication Inc.'s Request for Interpretation, Waiver, or Modification of the SBC/Ameritech Merger Conditions

The United States Telecom Association ("USTA") takes no position on the specific questions raised in SBC Communications Inc.'s ("SBC") request for interpretation, waiver or modification of the merger conditions adopted by this Commission in connection with its approval of the SBC/Ameritech merger. USTA feels compelled to respond, however, to the unprecedented suggestion, set forth in several sets of comments, that the network configuration decisions that purportedly led to SBC's request are properly the subject of Commission review. These commenters propose a system under which the retail network design decisions of incumbent LECs would be subject to Commission approval. They even suggest that network design decisions should be made as part of a "collaborative" process with new entrants who wish to use the network as a platform to provide their own retail services.

USTA wishes to make three points about any such proposal. *First*, it is bad policy to involve even the Commission, much less competitors, in making or approving incumbent LEC

decisions on the deployment of new technologies and the design of networks. Any such process would seriously delay the deployment of broadband and other advanced services to consumers. The Commission has repeatedly, and rightly, rejected any suggestion that it should be picking the technological winners and losers in the marketplace. *Second*, it is beyond the Commission's authority to dictate such decisions. SBC has a well-established right, as a carrier, to design its network and its retail services as it considers best to serve the public. Potential competitors, and even the Commission, simply have no say in how SBC chooses to spend its money and deploy its technology. *Third*, it is flatly contrary to the 1996 Act to suggest that the right of competitors to resell or obtain unbundled portions of the incumbents' network somehow translates into a right to dictate the overall configuration of that network, much less the particular technologies that an incumbent decides to use in providing its own retail services.

1. SBC's request is a narrow one. It asks only that the Commission, taking into account SBC's current network configuration and its obligations under the Communications Act and the SBC/Ameritech merger conditions, resolve whether two discrete pieces of network equipment (combination plugs/cards and optical concentration devices) may be owned by SBC's incumbent LECs. Several commenters, however, seek to broaden that request into a Commission investigation of the network configuration – specifically, the deployment of fiber facilities – that purportedly led to SBC's request.[1] These commenters contend that SBC's decision to deploy fiber in the place of copper wire in certain parts of its incumbent LEC networks is not amenable to their preferred methods for offering advanced services. And in their

[1] *See* Comments of the DSL Access Telecommunications Alliance ("DATA") at 14, 19, 21, 23 (FCC filed Mar. 3, 2000) (proposing "on-the-record technical conferences" and "industry roundtable discussions") ("*DATA Comments*"); Comments of the Association for Local Telecommunications Services at 15 (FCC filed Mar. 3, 2000) (proposing "separate public proceeding, including a public forum") ("*ALTS Comments*"); Comments of MGC Communications, d/b/a Mpower Communications Corp. at 3 (FCC filed Mar. 3, 2000) ("key network design decisions must be made on some collaborative basis rather than as unilateral decisions by incumbent LECs") ("*MGC Comments*"); Comments of Prism Communications Services, Inc. at 3 (FCC filed Mar. 3, 2000) (criticizing SBC for "dictating" its own network architecture) ("*Prism Comments*"); Comments of Sprint Corp. at 2 (FCC filed Mar. 3, 2000).

view, under the 1996 Act, "key" incumbent LEC decisions such as this "must be made on some collaborative basis,"[2] with Commission approval required before their implementation.

The commenters would thus have this Commission assume the position of deciding, on the basis of an unarticulated standard, what advanced services technologies the incumbent LECs should support, and how they should configure their networks to do so. The Commission, however, has already refused, and rightly refused, to take on such a role:

> As the demand for high-speed, high-capacity advanced services increases, incumbent telecommunications companies and new entrants alike are deploying innovative new technologies to meet that demand. *The role of the Commission is not to pick winners or losers,* or select the "best" technology to meet consumer demand, *but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the needs of consumers.* . . . We note that services that rely on digital subscriber line technology are but one of the advanced services currently in existence, and *we in no way mean to suggest digital subscriber line is the preferred technology.*[3]

The Commission's judgment in this regard is a sound one. Decisions on the deployment of new technologies should be made by market actors, in response to market forces, not by regulators in response to special interest pleading.[4] Any other regime would cause grave harm by introducing lengthy delays in the deployment of broadband and other advanced services to consumers.

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[2] *MGC Comments* at 3.

[3] Memorandum Opinion And Order and Notice Of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services*, 13 FCC Rcd 24011, at ¶¶ 2, 3 & n.6 (rel. Aug. 7, 1998) (emphasis added).

[4] The Commission's refusal to select winners and losers in the advanced services arena is consistent with its stated role elsewhere. *See, e.g.*, Second Report and Order, *Recommendation to Congress*, and Second Further Notice of Proposed Rulemaking, *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, 7 FCC Rcd 5781, ¶ 10 (1992) (In the context of Video Dialtone, although "the common carrier platform must . . . offer sufficient capacity to serve multiple providers on a nondiscriminatory basis, . . . *the technology and network design will be determined by the telephone companies rather than the government.*") (emphasis added); Second Annual Report and Analysis Of Competitive Market Conditions With Respect to Commercial Mobile Services, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market*

2. Even aside from the fact that such a regime would be bad policy, the Commission has no authority to undertake that role. An incumbent LEC is empowered, and legally obligated, to make investment decisions that it believes will maximize the value of its network, within the bounds of its existing legal obligations. It owes that duty to its shareholders, who bear the risk of those investment decisions. And the Commission has no authority to override those decisions or otherwise to appropriate the value of the incumbent LEC's network by forcing the LEC to make design decisions for the benefit of competitors.

Under rate-of-return regulation, regulators evaluated and approved requests to spend money on network improvements in order to protect ratepayers. But SBC and most other large LECs have been under price caps for over a decade. As the D.C. Circuit has clearly explained, under this price cap regime, "investors rather than ratepayers have borne the risk of loss on [LEC] assets." *Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555, 570 (1997), *cert. denied*, 523 U.S. 1046 (1998). That means that if the LEC makes a bad investment decision "company and shareholder profits decline[]." *Id.* Conversely, if the LEC makes a good investment decision, "investors should reap the benefit of increases in the value of such assets." *Id.* Any such increase in value "belongs to the shareholders, not the ratepayers." *Id.*

Just as the FCC cannot appropriate any increase in value from a LEC's investment decision, it cannot force a LEC to make bad investment decisions for the benefit of its competitors. For example, several commenters contend that SBC is obligated to continue to

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Conditions With Respect to Commercial Mobile Services, 12 FCC Rcd 11266, 11277 (rel. Mar. 25, 1997) ("The Commission declined to mandate a digital standard for cellular, wide-area SMR, or broadband PCS, *preferring instead to allow the marketplace, through innovation and competition, to determine which technical standards best meet the needs of the marketplace.*") (emphasis added); Third Annual Report and Analysis Of Competitive Market Conditions With Respect to Commercial Mobile Services, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 13 FCC Rcd 19746, 19784 (1998) ("When the Commission created broadband PCS, it chose not to mandate the use of a specific technology.").

support copper facilities.[5] But if SBC does so, it will do so at its own expense. And if it turns out to be a bad idea, it is SBC's shareholders, and SBC's shareholders alone, who will pay.

The fact that new entrants *may* eventually pay for use of the network elements in question only reinforces this analysis. Insofar as rates are based on TELRIC, that methodology looks not to the actual investment costs incurred by the incumbent LEC but rather to the hypothetical costs of an ideally efficient carrier. More importantly, UNE rates pay, not for the underlying facilities, but only for the competitor's *use* of those facilities. New entrants are not obliged to buy UNEs, and if an incumbent LEC makes an investment decision (or is forced to make such a decision) that turns out to be unwise, they will not do so, even if they urged the investment in the first place.

3. Any suggestion that the Commission should begin dictating network design for the benefit of new entrants is absolutely contrary to the 1996 Act. "[T]he basic congressional objective" of the Act – the introduction of competition in the local exchange – "is reasonably clear." *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 753 (1999) (Breyer, J., concurring in part and dissenting in part). The Act seeks to accomplish this objective by creating a set of obligations – interconnection, unbundled access, and resale – that will ease new entry into the provision of local phone service. But that new local entry is not an end in itself. Rather, those obligations are designed to encourage, "through interaction with the marketplace," the development of alternatives to the incumbent local exchange. *Id.* at 747.

Where the 1996 Act seeks to introduce facilities-based competition into the local exchange, the commenters to this proceeding seek something very different. They propose a permanent nationalization of the incumbent LEC's network, with the Commission, not the "marketplace," in the position of deciding how incumbent LECs develop their networks, with what technology, and when. Contrary to the 1996 Act's "de-regulatory framework" for the

[5] *Prism Comments* at 5-6; *MGC Comments* at 6.

provision of local telecommunications service,[6] this is a world in which investment decisions are driven, "not [by] competition, but [by] pervasive regulation." 119 S. Ct. at 754 (Breyer, J., concurring in part and dissenting in part).

The statutory language provides no support for subjecting incumbent LEC network decisions to Commission review. Indeed, section 259 of the Act suggests precisely the opposite. That section provides that "[a] local exchange carrier . . . that has entered into an infrastructure sharing agreement . . . shall provide . . . timely information on the planned deployment of telecommunications services and equipment." 47 U.S.C. § 259(c). The statute thus calls not for CLEC participation in Commission-sanctioned oversight of incumbent infrastructure, but rather for LEC notification of independently arrived at network design decisions.

Section 251(c)(3), which some commenters suggest authorizes Commission review of incumbent LEC network design decisions,[7] does no such thing. That provision, which requires incumbents to provide unbundled access to its *existing* network elements, cannot be read to authorize Commission authority over an incumbent's *future* network design. Indeed, the United States Court of Appeals for the Eighth Circuit has already rejected a much less ambitious effort to interfere with the incumbent LEC's network decisions. In the *Local Competition First Report and Order*, the Commission interpreted section 251(c)(3) to require incumbent LECs to provide superior quality network elements than the incumbent provided itself (47 C.F.R. § 51.311(c)), and to provide elements in combinations that did not "ordinarily" exist in the incumbent's network (*id.* § 51.315(c)).[8] These rules would have required incumbents to make network

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[6] S. Rep. No. 104-230, at 1 (1996).

[7] *MGC Comments* at 3-4; *ALTS Comments* at 8-9.

[8] *See* First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition First Report and Order*"), *aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part and remanded, AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

decisions based not on their own business needs, but rather to accommodate CLEC requests. But because the Act's obligations extend only to what incumbents must do with their existing network, and cannot be read to force incumbents to *restructure* their network for the benefit of others, the Eighth Circuit struck those rules down. *See Iowa Utils. Bd.*, 120 F.3d at 819 & n.39. In the court's view, the Act "requires unbundled access only to an incumbent LEC's *existing* network – *not to a yet unbuilt superior one*." *Id.* at 813 (emphasis added). Thus, section 251(c)(3) "does not mandate that incumbent LECs cater to every desire of every requesting carrier," *id.*, and it surely does not authorize Commission intervention to ensure that an incumbent LEC's network is designed as CLECs see fit.[9]

Nor is the obligation to provide "nondiscriminatory" interconnection and unbundled access justification for Commission control over incumbent LECs' network design decisions. As the Commission has already established, the nondiscrimination obligations of the Act, *see, e.g.*, 47 U.S.C. §§ 251(c)(2), (3), may "include modifications to incumbent LEC facilities," but only "to the extent necessary to accommodate interconnection or access to network elements." *Local Competition First Report & Order* ¶ 198; *see also Iowa Utils. Bd.*, 120 F.3d at 813 & n.33. And "[t]he fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others." 120 F.3d at 813. That requirement "does not mandate that incumbent LECs cater to every desire of every requesting carrier," much less that incumbent LECs seek Commission approval prior to implementing changes to their infrastructures. *Id.* As long as an incumbent LEC is providing access to all

[9] Following the Supreme Court's decision in *AT&T v. Iowa Utils. Bd.*, the Eighth Circuit ordered briefing on the effect of that decision – if any – on the Eighth Circuit's order vacating the superior quality rule and the rule requiring incumbent LECs to provide access to combinations of elements that do not "ordinarily" exist in the incumbent's network. As explained in briefs filed with the Eighth Circuit, the Supreme Court's *AT&T* decision has no bearing on those prior rulings. *See, e.g.*, Reply Br. for Petitioners Regional Bell Operating Companies and GTE, *Iowa Utils. Bd. v. FCC*, No. 96-3321 (and consolidated cases), at 39-42 (8th Cir. filed Aug. 31, 1999).

CLECs in the same manner as it provides access to its own affiliates, the nondiscrimination requirements are satisfied.

Nor, finally, does section 256 of the Act "mandate[] a cooperative effort in designing" incumbent LEC networks.[10] That section is focused on the exchange of information and the establishment of standards to ensure inter-network operability. It does not give the Commission any new authority over incumbent LEC design conditions. Indeed, section 256 expressly states that "[n]othing in this section shall be construed as expanding . . . any authority that the Commission may have had under law in effect before the date of enactment of [the 1996 Act]." 47 U.S.C. § 256(c). Thus, absent some indication that incumbent LEC network design decisions were subject to Commission review and approval before the 1996 Act, section 256 provides no new basis for such authority.

The Commission has already recognized, in its orders implementing the 1996 Act, that it has no authority to dictate network design decisions. In the *Line Sharing Order*, for example, the Commission undertook "to enable competitors to offer advanced services to end-users using the same telephone line the LEC uses to offer voice services."[11] The Commission thus "adopt[ed] a requirement that incumbent LECs unbundle the high frequency portion of the loop,"[12] but, in so doing, it expressly avoided any requirements that would "limit the availability of line sharing to any particular technology."[13] Moreover, it reaffirmed that the unbundling requirement allows entrants to share in the use of existing elements only to the extent that sharing does not interfere with the incumbent LEC's use of those elements. The Commission required access to the high

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[10] *DATA Comments* at 19.

[11] Third Report and Order in CC Docket No 98-147 and Fourth Report and Order in Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147 & 96-98, FCC 99-355, ¶ 10 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

[12] *Id.* ¶ 13.

[13] *Id.* ¶ 70.

frequency portion of the loop *only* "to the extent that the xDSL technology deployed by the competitive LEC does not interfere with the [incumbent LEC's] analog voiceband transmissions."[14] Thus, far from suggesting that the Commission will review incumbent LEC infrastructure for the benefit of certain CLEC advanced services offerings,[15] the *Line Sharing Order* expressly disclaims interest in preferring any particular technology, and it confirms that the incumbent LEC need not alter its own service offerings to accommodate line sharing requests.

To be sure, in the *Advanced Services Order*, the Commission did, as one commenter stresses,[16] state that "incumbent LECs should not unilaterally determine what technologies LECs, both competitive LECs and incumbent LECs, may deploy. Nor should incumbent LECs have unfettered control over spectrum management standards and practices."[17] The Commission therefore initiated a rulemaking regarding the establishment of "competitively neutral spectral compatibility standards and spectrum management rules and practices."[18] But that limited inquiry into how to unbundle an existing infrastructure is a far cry from regulatory control over an incumbent LEC's strategic investment decisions. Indeed, in the very same passage in which the Commission announced this initiative, it refuted the notion that its standard-setting role would extend to influencing the network configuration of *any* carrier, including the incumbent LECs. The Commission stated that its purpose was only to ensure "that *all carriers* know . . .

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[14] *Id.*

[15] *See, e.g.*, Comments of AT&T Corp. at 15-16 (FCC filed Mar. 3, 2000).

[16] *See ALTS Comments* at 13-14.

[17] First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, ¶ 63 (1999) ("*Advanced Services Order*"); *see also Line Sharing Order* ¶ 179.

[18] *Advanced Services Order* ¶ 63.

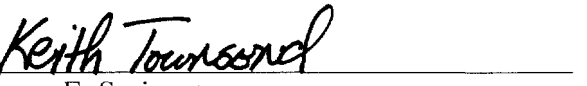
what technologies are deployable and *can design their networks and business strategies accordingly*."[19]

For all of these reasons, it is up to SBC alone to design its "business strategies," according to the interests of its shareholders, consistent with its obligations under the law. The Commission should confirm that, with respect to local competition, its role is confined to implementing the requirements set out in the 1996 Act, and it should reject, as it has in the past, the invitation to second-guess the marketplace on questions of network infrastructure.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

March 10, 2000



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[19] *Id.* (emphasis added).

CERTIFICATE OF SERVICE

I, Alicia Walls, do certify that on March 10, 2000 Reply Comments of the United States Telecom Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

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